Appendix "A"

[Title of District Court and Cause.]

MEMORANDUM AND ORDER

By this action, plaintiff seeks to recover for personal injuries which he sustained as a result of a fall down a staircase in a building owned by the United States at the Mare Island Naval Yard, Vallejo, California. At the time of his fall, plaintiff was an employee of the Mare Island Cafeteria System, a non-appropriated fund agency organized for the purpose of supplying food to the Naval Yard employees, working in the Commissioned Officers' Club, also a non-appropriated fund agency. The action is based on the provisions of Title 28 U.S.C.A. §1346(b), with the negligence of the United States claimed as being, (1) The failure to provide hand railing for the staircase, (2) The protrusion of steel strips affixed to the edge of each step in such a manner that they created a hazard, and (3) The failure to properly light the staircase. Defendant, United States of America, bases its defense on the grounds that plaintiff was contributorily negligent, and that plaintiff was an employee of the United States, and thus not entitled to recover under the Federal Tort Claims Act.

This action was tried by the Court sitting without a jury on October 24, 1956, at the conclusion of which trial, the Court ordered the matter submitted. For good cause, the Court, on November 1, 1956, vacated its previous order submitting the case for decision,

and ordered both parties to submit posttrial memoranda. On November 15, 1956, in compliance with the order of the Court, plaintiff filed his memorandum. Under the terms of the Court's order, defendant was required to file its answering memorandum within fifteen days after receipt of plaintiff's opening memorandum, and plaintiff was given the right to reply thereto. Counsel for plaintiff has certified that a copy of his opening memorandum was mailed to counsel for defendant, United States, on November 14, 1956. Upon examination of the file by the Court on July 22, 1957, the record disclosed that counsel for defendant has not only failed to make any effort to comply with the time limitation set forth in the Court's order, but has failed to file any memorandum whatsoever. The record is devoid of any reasons for this delay, if, indeed, such dereliction could ever be justified. Sufficient time having elapsed to allow defendant to make a response, it appears obvious from the record that defendant does not intent to respond. Accordingly, the matter has been ordered submitted as of July 22, 1957.

The failure of defendant to afford the Court any help in this matter might be taken as an indication that it does not desire to contest the contentions made by plaintiff. Certainly it puts the Court in the unenviable position of having to do the work that properly should be done by counsel for defendant.

Defendant contends that plaintiff is without status to propel a Federal Tort Claims action. With this, the Court does not agree. Plaintiff argues that he has

a right to recover from defendant for his injuries (he not being an employee of defendant at the time of the accident) under the common law rules of negligence. His position in this regard appears to the Court to be sound. The remaining issues to be resolved are whether defendant was negligent, and whether plaintiff was guilty of contributory negligence. From the record and the applicable law, it appears to the Court that defendant was negligent in its conduct toward plaintiff, and that plaintiff was not guilty of any negligence which contributed to the accident and/or his injuries.

The Court is of the view that on the issue of liability the judgment must be for plaintiff.

It Is, Therefore, Ordered that judgment be for the plaintiff on the issue of liability in this case, and that this case be set down for further trial on Friday, September 13th, 1957, for the purpose of fixing the damages sustained by the plaintiff. Each of the parties will be prepared to proceed on this date to present to the Court any evidence that may bear upon the issue of damages in this case. The issue of damages is the sole question that will be considered by the Court on the date last mentioned above.

Dated: August 2nd, 1957.

/s/ SHERRILL HALBERT
United States District Judge

[Endorsed]: Filed August 2, 1957.

Appendix "B"

[Title of District Court and Cause.]

MEMORANDUM AND ORDER

This Court has heretofore resolved the issue of liability in this case and supported its opinion in that regard by a Memorandum and Order, filed herein on August 2, 1957. By that order the matter was set down for further trial on the issue of damages on September 13, 1957. The trial on the issue of damages came on regularly for hearing on this latter date. Both parties appeared by their respective counsel, and in due course the matter was submitted for decision and determination by the Court.

After having given full consideration to all of the evidence adduced in this case, the Court has come to the conclusion that plaintiff is entitled to recover from the defendant, United States of America, damages in the sum of $12,673.26, and accordingly judgment will be entered in favor of the plaintiff and against the defendant in this amount.

It Is, Therefore, Ordered that plaintiff have judgment against the defendant, United States of America, in this action in the sum of $12,673.26 (This includes both general and special damages.), together with any costs which may be authorized by law. Plaintiff will prepare findings of fact and conclusions of law, a form of judgment and any and all other documents necessary to the final disposition of this case in ac-

cordance with this order, and lodge them with the Clerk of this Court at the time and in the manner prescribed by the applicable rules and statutes.

Dated: December 31, 1957.

/s/ SHERRILL HALBERT
United States District Judge

[Endorsed]: Filed December 31, 1957.

Appendix "C"

United States Court of Appeals
for the Ninth Circuit

United States of America, Appellant, vs. Fernando S. Forfari, Appellee.	No. 16,032 June 8, 1959

Appeal from the United States District Court for the Northern District of California Northern Division

Before: HAMLEY, HAMLIN and JERTBERG, Circuit Judges.

HAMLIN, Circuit Judge:

The United States here appeals from a judgment of the District Court awarding Fernando S. Forfari damages in the amount of $12,673.26. Forfari's action was based on provisions of the Federal Tort Claims Act (28 U.S.C. 1346(b)).[1] Jurisdiction in this court rests on 28 U.S.C. § 1291.

[1] "§ 1346. United States as defendant

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(b) . . . the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Govern-

The accident giving rise to the suit occurred on November 21, 1951, in the Commissioned Officers' Mess at Mare Island Naval Shipyard, Vallejo, California. Forfari, a chef, sustained personal injuries when he slipped and fell down a flight of stairs which led from the kitchen to the employees' washroom in the Officers' Mess. The District Court found that the injuries were proximately caused by the negligence of the United States in certain particulars not here relevant.

The Government attacks this judgment by contending: (1) that Forfari was an employee of the United States and is therefore barred from bringing an action under the Federal Tort Claims Act, and/or (2) that Forfari, as an employee of a non-appropriated fund instrumentality of the United States, is precluded from bringing this action because of his recovery under the California Workmen's Compensation Act.

We agree with the contentions of the appellant.

Forfari, a civilian, was employed by the Mare Island Cafeteria System. The Cafeteria System was organized and operated under Navy Civilian Personnel Instruction 66,[2] for the purpose of supplying food

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ment while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

[2]Navy Civilian Personnel Instruction 66 provides in pertinent part:

"Section 2

• • •

"2-1. PURPOSES OF EMPLOYEE SERVICES.—The purposes of an employee services program are to keep employees informed of the policies and rules established by management, to make available for them where necessary those

to Naval Yard personnel. As a contract concessionaire, the Cafeteria System also provided food services to the Commissioned Officers' Mess at the Naval Shipyard. The Cafeteria System is operated as a non-

facilities which reduce to a minimum interruptions of work for personal affairs, and to provide bases for the development and continuance of interest in their jobs and places of work.

"2-2. DEPARTMENT POLICY.—It is the policy of the Department that a program of employee services based on the needs of the service be established in each naval activity. Only those services which contribute to morale, job interest, cooperation, better attendance, health, and productive output are considered justified under this program.

"2-3. ORGANIZATION AND ADMINISTRATION.—a. *Principles of operation.*—Employee services are an integral part of the Industrial Relations Program, and as such should consist only of facilities which contribute to the efficiency of the service. In no case should services be instituted which are adequately provided by community resources and care must be exercised to avoid providing facilities which offer competition to private business in the community. The Department, nevertheless, is concerned with steady day-to-day attendance and production of its employees, and where the absence of adequate community and business resources causes troublesome work interruptions, consideration should be given to the development of necessary employee services.

• • • •

"Section 4

• • • •

"4-1. GENERAL STATEMENT.—It is the policy of the Department of the Navy to make available such assistance and facilities as are necessary so that employees may provide for themselves in-plant food service where necessary and practicable. Food service in general includes cafeterias, lunch counters, canteens, and vending machines, which will be operated in conformance with the provisions of this Section. Under certain conditions General Mess and Commissary Stores will be made available to employees as outlined in NCPI 66.4-5 and 4-6.

"4-2. ADMINISTRATION OF FOOD SERVICE.—a. *Organization.*—Food service is operated for the benefit of all employees of an activity through the medium of employee representatives who determine operating policies and procedures, subject to approval of the head of the activity. Normally employee organization and participation may be initiated by the appointment by the head of the activity of a

profit corporation, managed by a civilian, and governed by a civilian board of directors. The Board of Directors reports to the Industrial Relations Officer, a naval officer, and its members are appointed by the naval officer commanding the shipyard.

Activities such as the Mare Island Cafeteria System are characterized as non-appropriated fund instrumentalities of the United States. It is settled law that such activities are integral parts of the Government's military services. *Standard Oil Co. v. Johnson,* 1942, 316 U.S. 481, held that Army post exchanges were arms of the federal government and as integral parts of the War Department partook of its immunity under the federal Constitution and statutes. *Nimro v. Davis,* (D.C. Cir., 1953) 204 F.2d 734, certiorari denied, 346 U.S. 901, held that Naval food services established under NCPI 66[3] serve the same purpose as Army post exchanges, perform a governmental function, and are arms of the United States.

Appellee concedes that the Cafeteria System is a federal instrumentality, but denies that this makes him a federal employee. Appellee, for this proposition,

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five to seven member Cafeteria Association. However, the commanding officer may determine under certain circumstances that it is in the best interest of the employees and the activity to have some or all of the members of the Cafeteria Association designated through an elective process, or nominated by employee groups. In this manner employees and employee groups would be given the opportunity to select representatives responsible for the food service and its operation, subject to the provisions of this Section."

[3]Navy Civilian Personnel Instruction 66; see Footnote 2.

relies on *Faleni v. United States,* (D.C. N.Y., 1949) 125 F.Supp. 630.[4]

We are not in agreement with the *Faleni* case.[5] *Faleni* was decided in 1949. In June of 1952, Congress

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[4]*Faleni v. United States* (D.C. N.Y., 1949) 125 F.Supp. 630, held that a civilian laundry worker employed by the "Ships Service Department" at a naval air station was not barred from bringing an action under the Tort Claims Act. The Court, in holding that Faleni was not an employee of the United States, emphasized that the plaintiff's salary was not paid from funds appropriated by Congress, that the Ships Service paid its own obligations for maintenance and upkeep, and carried its own insurance for its equipment.

Daniels v. Chanute Air Force Base Exchange (Ill., 1955) 127 F.Supp. 920, although expressly rejecting *Faleni's* basis for holding that Faleni was *not* a federal employee, held that an employee of an Air Force Base Exchange *was* a federal employee, but *could* bring an action under the Tort Claims Act, because 5 U.S.C. 150k-1 did not at that time make that the exclusive remedy. We disagree with the *Daniels* case.

[5]The rationale of *Faleni* (see footnote 4, supra) appears to us to be wholly inconsistent with the following excerpts from *Standard Oil Co. v. Johnson*, 1942, 316 U.S. 481:

> "Congressional recognition that the activities of post exchanges are governmental has been frequent. Since 1903, Congress has repeatedly made substantial appropriations to be expended under the direction of the Secretary of War for construction, equipment, and maintenance of suitable buildings for post exchanges. In 1933 and 1934, Congress ordered certain moneys derived from disbanded exchanges to be handed over to the Federal Treasury.
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> "The Government assumes none of the financial obligations of the exchange. But government officers, under government regulations, handle and are responsible for all funds of the exchange which are obtained from the companies or detachments composing its membership. Profits, if any, do not go to individuals. They are used to improve the soldiers' mess, to provide various types of recreation, and in general to add to the pleasure and comfort of the troops."

enacted (66 Stat. 138) 5 U.S.C. § 150k,[6] which expressly exempted civilian employees of non-appropriated fund activities from the operation of the Civil Service Commission and the provisions of the Federal Employees Compensation Act. The legislative history of this Act[7] clearly shows that the Act was passed to allay the doubts raised by the *Standard Oil* case, *supra*, as to whether or not the various Civil Service laws and regulations were applicable to civilian employees of non-appropriated fund activities. The Civil Service Commission believed that as a result of the *Standard Oil* case "it was necessary to consider persons employed in these activities as federal employees and subject to the usual personnel laws."[8]

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[6]"§ 150k. Civilian employees not subject to laws administered by Civil Service Commission

Civilian employees, compensated from nonappropriated funds, of the Army and Air Force Exchange Service, Army and Air Force Motion Picture Service, Navy Ship's Stores Ashore, Navy exchanges, Marine Corps exchanges, Coast Guard exchanges, and other instrumentalities of the United States under the jurisdiction of the Armed Forces conducted for the comfort, pleasure, contentment, and mental and physical improvement of personnel of the Armed Forces, shall not be held and considered as employees of the United States for the purpose of any laws administered by the Civil Service Commission or the provisions of the Federal Employees' Compensation Act, as amended: *Provided*, That the status of these nonappropriated fund activities as Federal instrumentalities shall not be affected. June 19, 1952, c. 444, § 1, 66 Stat. 138."

[7]Senate Report No. 1341, 82d. Cong., Second Sess. (1952); House Report No. 1995, 82d. Cong., Second Sess. (1952); 2 U.S. Code Congressional & Administrative News (1952), p. 1520.

[8]Letter dated July 23, 1951, from Robert Ramspeck, the chairman of the Civil Service Commission, to Hon. Tom Murray, Chairman of the Committee on Post Office Civil Service, H.R. (2 U.S.Code & Admin. News, 1952, p. 1523).

The Department of Defense did not believe these employees should be included within the federal civil service. The Department of Defense pointed up the administrative difficulties that would result if all such employees (many of whom were employed and released daily) were subject to its laws. Thus, 5 U.S.C. 150k was enacted, providing that civilian employees in Forfari's status "shall not be held and considered as employees of the United States *for the purposes* of any laws administered by the Civil Service Commission or the provisions of the Federal Employees Compensation Act. . . ." [Emphasis added]

In addition to specifically exempting these employees from civil service regulation and federal employee compensation benefits, § 150k-1 of the Act required the non-appropriated fund activities to provide the employees with workmen's compensation and employer's liability insurance.[9] House Report No. 1995 stated that the Act thus assured the employees that "their present benefits provided through private insurance for workmen's compensation and employer's liability will be continued."

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[9] 5 U.S.C.A. 150k-1 was amended on July 18, 1958 (Public Law 85-538, § 1, 72 Stat. 397). As amended, 150k-1 now makes the Longshoremen's and Harbor Workers' Compensation Act applicable to civilian employees of any nonappropriated fund instrumentality described in § 150k. The amendment further provides that "such liability shall be exclusive and in the place of all other liability of the United States. . . ."

Thus, if Forfari's injuries had been sustained at the date of this writing there would be no question but that he would have a right to compensation under the Longshoremen's and Harbor Workers' Compensation Act and would not have a right to sue under the Tort Claims Act.

Thus 5 U.S.C. 150k and 150k-1 serve these two purposes: (1) to render inapplicable civil service control over such employees (because of the administrative difficulties), and (2) to place the financial burden of compensation insurance for such employees on the non-appropriated fund activities rather than on the federal government. 150k, however, expressly provided that the status of these non-appropriated fund activities as federal instrumentalities should not be affected.

Forfari's accident occurred on November 21, 1951, some seven months prior to the passage of §§ 150k and k-1. However, as indicated in the legislative history, it was the practice of the exchanges, food services, and the like, to provide the workmen's compensation that the June, 1952, act later made mandatory. The Mare Island Cafeteria System did provide Forfari with such benefits. It is conceded that the California State Fund Insurance Company has awarded Forfari $4,085.76 for the injuries sustained by reason of his fall.

We believe that it is reasonable to say that, if in 1951 the Mare Island Cafeteria System had not provided its employees with workmen's compensation for injuries incurred by them in the scope of their employment, such injuries would have been compensable under the Federal Employees' Compensation Act, and that it took the passage of § 150k in 1952 to remove employees such as Forfari from the protection afforded by the Federal Employees' Compensation Act.

It was not until 150k-1 was amended in 1958 that the protection afforded by that statute was expressly

made the exclusive remedy of those within its scope. Yet, when the entire statutory system of remedies provided by the federal government for its employees is viewed in perspective, it is clear that such injuries are, and always have been, beyond the purview of the Tort Claims Act. ". . . the test established by the Tort Claims Act for determining the United States' liability is whether a private person would be responsible for similar negligence under the laws of the state where the acts occurred." *Rayonier, Inc. v. United States,* 1957, 352 U.S. 315.

Under the California law, of course, this on-the-job injury would be compensable under Workmen's Compensation and unless the employer failed to carry such insurance, the injured employee could not bring an action in tort against his employer. California Labor Code, § 3601. *Duprey v. Shane,* 1952, 39 Cal. 2d 781, 249 P.2d 8.

The states have enacted their workmen's compensation schemes and made the remedies provided therein exclusive for industrial accidents. The federal statutory scheme, though providing various remedies for its various classifications of employees, is of the same import. Thus, *Feres v. United States,* 1950, 340 U.S. 135, in holding that the government was not liable under the Tort Claims Act for injuries to military personnel sustained while on active duty, said:

> "This court, in deciding claims for wrongs incident to service under the Tort Claims Act, cannot escape attributing some bearing upon it to enactments by Congress which provide systems of

simple, certain and uniform compensation for injuries or death of those in the armed services."

In *Johansen v. United States*, 1952, 343 U.S. 427,[10] the Court held a civilian employee of the United States on a "public vessel" was precluded from seeking recovery under the Public Vessels Act. The Federal Employees Compensation Act was his exclusive remedy. The Court said that it must "attempt to fit the Public Vessels Act as intelligently and fairly as possible into the entire statutory system of remedies against the government to make a workable, consistent and equitable whole."[11]

A recent case, decided by the District of Columbia Circuit, is particularly worthy of note: *Aubrey v. United States*, (D.C., 1958) 254 F.2d 768. In *Aubrey*, despite a pre-trial stipulation that the plaintiff, a civilian employee of an officers' mess, was not a fed-

[10]Recently, in *Patterson v. United States*, No. 429, October Term, 1958 (Decided May 18, 1959), the Supreme Court was asked to reconsider the Johansen case. The Court reaffirmed *Johansen*, and stated: "The United States 'has established by the Compensation Act a method of redress for its employees. There is no reason to have two systems of redress.'"

[11]It is worthy of note that the Federal Employees Compensation Act was not *expressly* made the exclusive remedy for federal employees until 1949. In answer to a contention that this indicated that prior to 1949 it was not the exclusive remedy, the Supreme Court said:

> "The background of the amendment shows, however, that this impression is erroneous. . . . The purpose of the 1949 amendment is simply 'to make it clear that the right to compensation benefits under the Act is exclusive and in place of any and all other legal liability of the United States or its instrumentalities. . . .' Senate Report 836, 81st Cong., First Sess., p. 23."

'eral employee, the Court held that he was precluded from maintaining a Tort Claims action. The Court of Appeals said:

> "We conclude that Aubrey is precluded from maintaining this suit under the Tort Claims Act by the principle set forth in Feres and Johansen that the Act was not intended to grant the right to sue the government to one who has been provided another remedy against its own instrumentality by the government through a system 'of simple, certain and uniform compensation for injuries and death.' The compensation system provided for plaintiff Aubrey must, like the Tort Claims Act, 'be construed to fit so far as will comport with its words into the entire statutory system of remedies against the government to make a workable, consistent and equitable whole'."

While Aubrey's injuries were sustained after the passage of the 1952 Act (5 U.S.C. 150k, k-1) and Forfari's injuries were sustained shortly before that Act, we do not believe that that fact is decisive of this appeal. The 1952 Act (150k, k-1) on the one hand denied such employees a remedy under F.E.C.A. and on the other hand required the civilian instrumentalities to provide Workmen's Compensation. The Act neither altered the status of Forfari's employment, nor affected the nature of his accident. This was a "scope of employment" type injury—compensable under Workmen's Compensation in virtually every state in the Union, and under F.E.C.A. for federal employees. The fact that at the time of this injury the financial

obligations as between the federal government and the civilian instrumentality of the government had not been clearly delineated, does not transform this compensable industrial accident into an action under the Tort Claims Act.

We hold that Forfari was at the time of his injury a federal employee and that he is precluded from bringing an action under the Tort Claims Act.

The judgment of the District Court is reversed.

(Endorsed:) Opinion. Filed June 8, 1959.

Paul P. O'Brien, Clerk.

Appendix "D"

United States Court of Appeals
for the Ninth Circuit

United States of America, Appellant, vs. Fernando S. Forfari, Appellee.	No. 16,032

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Northern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Northern Division and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is reversed.

Filed and entered June 8, 1959.

Appendix "E"

STATUTES

28 U.S.C. 1346. United States as defendant

* * *

(b) . . . the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Cal. Labor Code § 3852. Action against third person; rights of employee and employer. The claim of an employee for compensation does not affect his claim or right of action for all damages proximately resulting from such injury or death against any person other than the employer. Any employer who pays, or becomes obligated to pay compensation, or who pays, or becomes obligated to pay salary in lieu of compensation, may likewise make a claim or bring an action against such third person. In the latter event the employer may recover in the same suit, in addition to the total amount of compensation, damages for

which he was liable including all salary, wage, pension, or other emolument paid to the employee or to his dependents.

Cal. Insurance Code.

§ 11770. Continuance of fund: Administration: Purpose: Appropriations: Board of directors: Members: Terms: Expenses and compensation: Qualifications. The State Compensation Insurance Fund is continued in existence, to be administered by its board of directors for the purpose of transacting workmen's compensation insurance, and insurance against the expense of defending any suit for serious and wilful misconduct, against an employer or his agent, and insurance to employees and other persons of the compensation fixed by the workmen's compensation laws for employees and their dependents. Any appropriation made therefrom or thereto before the effective date of this code shall continue to be available for the purposes for which it was made.

The board of directors of the State Compensation Insurance Fund is composed of the Director of Industrial Relations, who is chairman thereof, and four members who shall be appointed by the Governor. The term of office of the members of the board, other than that of the director, shall be four years and they shall hold office until the appointment and qualification of their successors. The terms of the first four members so appointed shall expire as follows: One

on January 15, 1946; one each on January 15, 1947, January 15, 1948, and January 15, 1949. Each member shall receive his actual and necessary traveling expenses incurred in the performance of his duty as a member and, except the Director of Industrial Relations, twenty dollars ($20) for each day of his actual attendance at meetings of the board. In order to qualify for membership on the board, each member other than the director shall have been a policyholder or the employee of a policyholder in the State Compensation Insurance Fund for one year prior to his appointment, and must continue in such status during the period of his membership.

§ 11774. Application of assets of fund. The assets of the fund shall be applicable to the payment of losses sustained on account of insurance and to the payment of the salaries and other expenses charged against it in accordance with the provisions of this chapter.

§ 11778. Transaction of workmen's compensation insurance: Scope of authority. The fund may transact workmen's compensation insurance required or authorized by law of this State to the same extent as any other insurer.

§ 11779. Federal compensation insurance. The fund may insure employers against their liability for compensation or damages under the United States Longshoremen's and Harbor Workers' Compensation Act, as fully as any private insurer.

2 Navy Civilian Personnel Instruction 66 provides in pertinent part:

"Section 2

* * *

"2-1. Purposes of employee services.—The purposes of an employee services program are to keep employees informed of the policies and rules established by management, to make available for them where necessary those facilities which reduce to a minimum interruptions of work for personal affairs, and to provide bases for the development and continuance of interest in their jobs and places of work.

"2-2. Department policy.—It is the policy of the Department that a program of employee services based on the needs of the service be established in each naval activity. Only those services which contribute to morale, job interest, cooperation, better attendance, health, and productive output are considered justified under this program.

"2-3. Organization and administration.—a. Principles of operation.—Employee services are an integral part of the Industrial Relations Program, and as such should consist only of facilities which contribute to the efficiency of the service. In no case should services be instituted which are adequately provided by community resources and care must be exercised to avoid providing facilities which offer competition to private business in the community. The Department, nevertheless, is concerned with steady day-to-day attendance and production of its employees,

and where the absence of adequate community and business resources causes troublesome work interruptions, consideration should be given to the development of necessary employee services.

* * *

"Section 4

* * *

"4-1. General statement.—It is the policy of the Department of the Navy to make available such assistance and facilities as are necessary so that employees may provide for themselves in plant food service where necessary and practicable. Food service in general includes cafeterias, lunch counters, canteens, and vending machines, which will be operated in conformance with the provisions of this Section. Under certain conditions General Mess and Commissary Stores will be made available to employees as outlined in NCPI 66.4-5 and 4-6.

"4-2. Administration of food service.—a. Organization.—Food service is operated for the benefit of all employees of an activity through the medium of employee representatives who determine operating policies and procedures, subject to approval of the head of the activity. Normally employee organization and participation may be initiated by the appointment by the head of the activity of a five to seven member Cafeteria Association. However, the commanding officer may determine under certain circumstances that it is in the best interest of the employees and the activity to have some or all of the members of the Cafeteria

Association designated through an elective process, or nominated by employee groups. In this manner employees and employee groups would be given the opportunity to select representatives responsible for the food service and its operation, subject to the provisions of this Section."

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33 U.S.C. 933. Compensation for injuries where third persons are liable.

(a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the Secretary may provide, to receive such compensation or to recover damages against such third person.

(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person.

(c) The payment of such compensation into the fund established in section 944 of this title shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as "representative") to recover damages

against such third person, whether or not the representative has notified the deputy commissioner of his election.

(d) Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

(e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to—

(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner);

(B) the cost of all benefits actually furnished by him to the employee under section 907 of this title;

(C) all amounts paid as compensation;

(D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 907 of this title, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such

compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative.

(f) If the person entitled to compensation or the representative elects to recover damages against such third person and notifies the Secretary of his election and institutes proceedings within the period prescribed in section 913 of this title, the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person.

(g) If a compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter, the employer shall be liable for compensation as determined in subdivision (e) of this section only if such compromise is made with his written approval.

(h) The deputy commissioner may, if the person entitled to compensation under this chapter is a minor, make any election required under subdivision (a) of this section, or may authorize the parent or guardian of the minor to make such election.

(i) Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section. Mar. 4, 1927, c. 509, § 33, 44 Stat. 1440; June 25, 1938, c. 685, §§ 12, 13, 52 Stat. 1168; 1946 Reorg. Plan No. 2, § 3, eff. July 16, 1946, 11 F.R. 7873, 60 Stat. 1095; 1950 Reorg. Plan No. 19, § 1, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1271.

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5 U.S.C. § 150k. Civilian employees not subject to laws administered by Civil Service Commission.

Civilian employees, compensated from nonappropriated funds, of the Army and Air Force Exchange Service, Army and Air Force Motion Picture Service, Navy Ship's Stores Ashore, Navy exchanges, Marine Corps exchanges, Coast Guard exchanges, and other instrumentalities of the United States under the jurisdiction of the Armed Forces conducted for the comfort, pleasure, contentment, and mental and physical improvement of personnel of the Armed Forces, shall not be held and considered as employees of the United States for the purpose of any laws administered by the Civil Service Commission or the provisions of the Federal Employees' Compensation Act, as amended: *Provided,* That the status of these nonappropriated fund activities as Federal instrumentalities shall not be affected. June 19, 1952, c. 444, § 1, 66 Stat. 138.

5 U.S.C. 150k-1 (before 1958 Amendment—66 Stats. at L. 139, sec. 2).

The nonappropriated fund instrumentalities described in the first section of this act [i.e. sec. 150k] shall provide their civilian employees, by insurance or otherwise, with compensation for death or disability incurred in the course of employment. In the case of employees employed in the continental United States (except Alaska), compensation shall be not less than that provided by the laws of the State (or the District of Columbia) in which the employing activity of any such instrumentality is located. In the case of employees employed outside the continental limits of the United States and in Alaska, compensation shall be not less than that provided in sections 7, 8, and 9 of the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1427-1430), as amended, except that in the case of such employees who are not citizens of the United States, compensation shall be in accordance with regulations to be prescribed by the Secretary of the Army, Navy, Air Force, or Treasury, as the case may be. This section shall take effect sixty days after the date of enactment of this Act.

Approved June 19, 1952.

5 U.S.C. § 150k-1 (as amended 1958). Same: death or disability compensation; definitions; compensation districts; judicial proceedings; regulations; exclusiveness of remedy.

(a) The Longshoremen's and Harbor Workers' Compensation Act shall apply with respect to the disa-

bility or death resulting from injury, as defined in section 902(2) of Title 33, occurring to a civilian employee of any nonappropriated fund instrumentality described in section 150k of this title, subject to the following provisions of this section:

(1) For the purposes of section 150k of this title and this section, the term "employee" in section 902(3) of Title 33 shall include only—

(A) those employees of such nonappropriated fund instrumentalities as are employed within the continental United States and

(B) those United States citizens or permanent residents of the United States or a Territory who are employees of such nonappropriated fund instrumentalities outside the continental limits of the United States.

(2) For the purposes of section 150k of this title and this section, the term "employer" in section 902(4) of Title 33 shall include each of the nonappropriated fund instrumentalities described in section 150k of this title.

(3) For the purposes of section 150k of this title and this section, only that part of section 903(a) of Title 33 which precedes the first comma shall apply.

(4) The Secretary of Labor is authorized—

(A) to extend compensation districts established under section 939(b) of Title 33, or to establish new districts to include the areas outside the continental limits of the United States and

(B) to assign to each such district one or more deputy commissioners as the Secretary deems advisable.

Judicial proceedings under sections 918 and 921 of Title 33 with respect to any injury or death occurring outside the continental limits of the United States shall be instituted in the district court within the territorial jurisdiction of which is located the office of the deputy commissioner having jurisdiction in respect of such injury or death (or in the United States District Court for the District of Columbia if such office is located in such district).

(b) In case of disability or death resulting from injury, as defined in section 902(2) of Title 33, of an employee who is not a citizen or permanent resident of the United States or a Territory, employed outside the continental limits of the United States by any nonappropriated fund instrumentality described in section 150k of this title, compensation shall be provided in accordance with regulations prescribed by the Secretary of the military department concerned and approved by the Secretary of Defense or regulations prescribed by the Secretary of the Treasury, as the case may be.

(c) The liability of the United States or of any nonappropriated fund instrumentality described in section 150k of this title, with respect to the disability or death resulting from injury, as defined in section 902(2) of Title 33, of any employee referred to in subsection (a) or (b) of this section, shall be de-

termined as provided in section 150k of this title and this section. Such liability shall be exclusive and in the place of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any person otherwise entitled to recover damages from the United States or such nonappropriated fund instrumentality on account of such disability or death in any direct judicial proceedings, in a civil action, or in admiralty, or by proceedings whether administrative or judicial, under any workmen's compensation law or under any Federal tort liability statute. June 19, 1952, c. 444, § 2, 66 Stat. 139, amended July 18, 1958, Pub. L. 85-538, § 1, 72 Stat. 397.